

N O. 22806

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORLANDO L. DURAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I

STATUTE INVOLVED

Title 21, United States Code, Section 176(a), provides in pertinent part as follows:

". . . whoever, knowingly, with intent to defraud the United States, . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20, 000.

[R. T. 46]. Defendant Duran told Lusardi that the kilos in the garage were wrapped differently because they had opened them up to ascertain whether the marihuana had been either "sugared or honeyed down" [R. T. 46]. Defendant Duran then unlocked and opened the garage door [R. T. 46, 70]. In the garage Agent Lusardi examined a box containing approximately 14 kilograms of marihuana. He then told defendants Ward and Duran he was satisfied and would get his partner and load the marihuana into his vehicle [R. T. 46].

Agent Lusardi and Miser then returned to the government car. Agent Lusardi told Agent Walker he had seen the marihuana and told him to drive to the backyard. Agent Walker drove up the driveway where defendant Duran instructed him to back his car next to the Volkswagen and to shut off the lights of his vehicle [R. T. 79]. Agent Lusardi then placed Miser under arrest, while Agent Walker placed defendant Duran and defendant Ward under arrest [R. T. 47-48, 60-62, 79].

III

A. THE EVIDENCE IS SUFFICIENT TO
SHOW THAT DURAN WAS IN POSSESSION
OF THE MARIHUANA CHARGED IN
COUNT I OF THE INDICTMENT.

Section 176(a), Title 21, United States Code, provides that proof of possession of marihuana is sufficient evidence to authorize conviction unless that possession is explained to

the satisfaction of the jury.

"Possession" sufficient to support the inference of importantion and knowledge provided in Section 176(a) of Title 21, United States Code, means having marihuana under one 's dominion and control to such a degree as to have the power of disposal. Such possession can be constructive and need not be exclusive, but may be joint.

Rodella v. United States, 286 F. 2d 306, 311

(9 Cir. 1960), cert. den. 365 U.S. 889 (1961);

Dolliver v. United States, 379 F. 2d 307

(9th Cir. 1967).

Actual or constructive possession may be proved by circumstantial evidence.

Cellino v. United States, 276 F. 2d 941

(9th Cir. 1960).

Whether or not defendant Duran spoke to Agent Lusardi at the outset of the negotiations, it is clear from the evidence that defendant Duran had joint dominion and control over the marihuana in the trunk of the Volkswagen which is the subject of Count I. After Agent Lusardi went to the backyard with defendants Duran and Ward, defendant Duran told defendant Ward to open the trunk of the Volkswagen to show Agent Lusardi the marihuana [R. T. 45]. Defendant Ward complied [R. T. 45].

As Lusardi was examining the marihuana, defendant Duran told the agent that if he wanted to take a closer look at the marihuana he could take several kilos into the house to look at

them in the light [R. T. 45]. He also stated that there were 46 kilos in the trunk [R. T. 45-46].

The above evidence shows that Duran had knowledge of the location of the marihuana in the car and a knowledge of the precise amount. Also apparent is his desire and ability to facilitate the sale of it. The instruction to defendant Ward and defendant Ward's compliance with those instructions further show dominion and control over the contraband. It also must be pointed out that near the end of the entire transaction Duran instructed Agent Walker to back his car next to the Volkswagen, presumably to effect a transfer of the 46 kilos from Ward's car to the agent's [R. T. 79].

Appellant relies on Delgado v. United States, 327 F.2d 641 (9th Cir. 1964). However, in Delgado there was no evidence presented other than the fact that marihuana was found in the drawer of a nightstand at the foot of a bed occupied by the defendants. In this case, defendant Duran's statements establish his joint dominion and control.

B. THE EVIDENCE IS SUFFICIENT TO
SHOW THAT DURAN WAS IN POSSESSION
OF THE MARIHUANA CHARGED IN
COUNT II OF THE INDICTMENT.

After Agent Lusardi had seen the marihuana in the trunk of the car, defendant Duran told Lusardi there were 46 kilos of marihuana in the car and 14 more in the garage [R. T. 45-46].

The latter 14 kilos are the subject of Count II of the indictment [R. T. 47]. Defendant Ward told defendant Duran to open the garage. Defendant Duran then went to the garage, unlocked the door with a key from his key ring, and opened the garage door to show Agent Lusardi the marihuana. At this time Duran told Lusardi that the kilos in the garage were wrapped differently because they had previously been opened in order to ascertain whether the marihuana had been "sugared or honeyed down" [R. T. 46].

The fact that Duran gained access to the garage with his key indicates that he had control over that area.

"Proof that one had exclusive control and dominion over property on or in which contraband narcotics are found is a potent circumstance tending to prove knowledge of the presence of such narcotics and control thereof."

Evans v. United States, 257 F. 2d 121, 128 (9th Cir. 1958).

His statements to the agent further indicate that he had detailed knowledge of the quantity and quality of the marihuana by reason of his previous examination of it. Certainly reasonable minds could also conclude that he had the desire and power to dispose of it.

Klepper v. United States, 331 F. 2d 694 (9th Cir. 1964);

Rodella, supra, at p. 31;

Cellino, supra.

CONCLUSION

From the foregoing facts it can be seen that there was ample evidence, taking the view most favorable to the government, for reasonable minds to conclude that defendant was in possession of the marihuana involved in both counts. Therefore, the verdict of the jury as the sole triers of fact must be sustained.

Fraker v. United States, 294 F. 2d 859

(9th Cir. 1961).

Respectfully submitted,

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